IN THE

Supreme Court of the United States

No. 70-2

UNITED STATES OF AMERICA,
Appellant,

v.

12 200-FT. REELS OF SUPER 8 MM. FILM *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

Of Counsel:
EDWARD WEINBERG
GEORGE MIRON
EZRA C. LEVINE
1211 Conn. Ave., N.W.
Washington, D.C. 20036

THOMAS H. KUCHEL
WYMAN, BAUTZER, ROTHMAN & KUCHEL
1211 Conn. Ave., N.W.
Washington, D.C. 20036

Amicus Curiae

Washington, D. C. THUR. 20037

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INTEREST OF *AMICUS CURIAE*

The claimant-appellee appeared *pro se* in the proceeding below. He has made no appearance in this Court. On October 12, 1971, this Court invited the undersigned to brief and argue this case, as *amicus curiae*, in support of the judgment below.

QUESTION PRESENTED

Whether 19 U.S.C. 1305(a), prohibiting importation of obscene material, is unconstitutional as applied to seizure of obscene material in the possession of an individual returning from abroad, when such material is intended solely for his private use.

STATEMENT

On April 2, 1970, customs officials at Los Angeles Airport, after a customs search, seized certain motion picture films and printed materials found in the possession of Mr. Ariel G. Paladini, an American citizen returning from travel abroad. On April 9, 1970, the United States filed a Complaint, in the United States District Court for the Central District of California, for forfeiture of the seized material. The Complaint alleged that the material was subject to seizure and forfeiture under 19 U.S.C. 1305(a).

On April 27, 1970, the District Court entered an Order of Dismissal, before Answer. The District Court's decision is unreported. (A. 5). The Decision below was based on a Three-Judge Court decision in *United States v. Thirty-Seven (37) Photographs*, Civil No. 69-2242-F, 309 F. Supp. 36 (C.D. Calif.) holding that 19 U.S.C. 1305(a) was unconstitutional on its face. *Thirty-Seven (37) Photographs* was reversed, 402 U.S. 363, *rehearing denied*, 403 U.S. 924.

In a Motion for a Stay in the District Court, the United States advised the court that it had "no evidence with which to contradict Mr. Paladini's affidavit [that the films were intended solely for his personal use] and, therefore does not contest the fact that this was a private importation." (A. 7). Whether the items seized are obscene has not been determined. Their obscenity is assumed for purposes of argument, in view of the dismissal before answer or trial.

Probable jurisdiction was noted on June 21, 1971. (A. 17).

SUMMARY OF ARGUMENT

In *Stanley v. Georgia*, 394 U.S. 557, the Court decided that the First Amendment is transgressed when an individual is punished for possession for private use of obscene material in his own home.

The Court held that to punish such possession would be repugnant to the First Amendment, because it would intrude Government into the private thoughts of an individual, and into his right to read and observe privately what he pleases.

That principle would be equally offended by punishing a person for possession of such material for private use when re-entering the United States from abroad. This is far different from the case of a person returning from abroad with such material in his possession which he intends to sell or otherwise use commercially.

The validity of customs inspection, like the validity of a search pursuant to warrant in *Stanley v. Georgia*, is not at issue. The right to make such inspection or search does not foreclose the question of what constitutionally may be seized during the course of a valid inspection or a valid search. It would be anomalous to permit forfeiture of material, the possession of which cannot constitutionally be punished, where the intent is that it remain private.

In addition, if 19 U.S.C. 1305(a) were applied to importation of obscene material for private use, it would have a chilling effect on the right to receive non-obscene material.

Stanley v. Georgia also teaches that the First Amendment right to read or observe what one pleases, a right, "so fundamental to our scheme of individual liberty" (394 U.S. at 568), may not be restricted on the basis of an alleged need to ease the administration of otherwise valid laws, state or federal, dealing with obscenity.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE AFFIRMED. SECTION 1305(a) OF 19 U.S.C. IS UNCONSTITUTIONAL FOR OVERBREADTH BECAUSE, BY PERMITTING CUSTOMS SEIZURE OF MATERIAL INTENDED FOR HIS PERSONAL USE, AND WHICH ACCOMPANIES AN INDIVIDUAL ON HIS RE-ENTRY TO THE UNITED STATES, IT WOULD EFFECTIVELY DIMINISH A PERSON'S RIGHT TO READ OR OBSERVE WHAT HE PLEASES

It is well settled that a statute whose broad sweep prohibits acts of expression which may not be proscribed, as well as those which legitimately may be proscribed, is overbroad and in violation of the First Amendment. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 609. Section 1305(a) of 19 U.S.C. is overbroad. It would prohibit importation of obscene material regardless of use. It is therefore unconstitutional as applied to importation for private use.

I

THE FIRST AMENDMENT'S PROHIBITION AGAINST PUNISHMENT FOR POSSESSION OF OBSCENE MATERIAL FOR PRIVATE USE IS NOT LIMITED TO POSSESSION IN THE HOME

In *Stanley v. Georgia*, the state sought to support conviction of the defendant under a state statute prohibiting the possession of obscene material. The material consisted of three reels of motion picture films found by agents of both the United States and Georgia in the defendant's bedroom, during a search pursuant to warrant, for illegal bookmaking articles. The reels were viewed in the defendant's living room by use of a projector found in the house. The Georgia agent concluded the films were obscene and seized them. Thereafter, defendant was indicted and convicted for possession of the films. There was no evidence in the record that the officers had abandoned their search for bookmaking

paraphenalia at the time they viewed the films. It is possible that the films were viewed to determine whether bookmaking transactions were recorded thereon, as counsel for Georgia suggested during oral argument before this Court. (Transcript of Argument, *Stanley v. Georgia*, p. 24, January 14, 1969). In any event, the silence of the trial record on this point permits no inference that the authorized search for bookmaking paraphenalia had been abandoned or that an unauthorized search for other articles had begun.

Stanley v. Georgia, it appears, did not turn on the reasonableness of the search and seizure involved. The case is necessarily bottomed on the freedom of speech and press guarantied by the First Amendment, a guaranty recognized in *Stanley v. Georgia* as rooted in two fundamental, but separate, rights.

First, the Court stated, "It is now well established that the Constitution protects the right to receive information and ideas." (394 U.S. at 563). The Court cited as examples cases involving the right to receive door-to-door religious solicitations, *Martin v. City of Struthers*, 319 U.S. 141, 143; the right to receive medical advice on contraception, *Griswold v. Connecticut*, 381 U.S. 479, 482; the right to receive communist political propaganda, *Lamont v. Postmaster General*, 381 U.S. 301, 307-308 (Brennan, J., concurring); and the right of parents to choose schools where their children will receive appropriate training, *Pierce v. Society of Sisters*, 268 U.S. 510.

The Court concluded that "this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society" (394 U.S. at 564), citing *Winters v. New York*, 333 U.S. 507, 510, a case involving an obscenity prosecution.

Second, the Court explained that in the context of the prosecution for "mere possession of printed or filmed matter in the privacy of a person's own home" a separate and distinct constitutional right was involved, "for also fundamental is the right to be free, except in very limited circum-

stances, from unwanted governmental intrusions into one's privacy." (394 U.S. at 564).

The existence of that right—"the right to be let alone"—the Court traced from Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478; from the protection of privacy in marital relations, *Griswold v. Connecticut*, 381 U.S. at 482, and from the right to privacy in one's personal associations referred to in *NAACP v. Alabama*, 357 U.S. 449, 462.

Thus, the Court was concerned with two great constitutional freedoms, the right to receive information and ideas regardless of their social worth, and the right to be free of government intrusion into one's privacy.

Appellant argues that *Stanley* protects material only where privately possessed within the home. But *Stanley* cannot be so artificially constricted. The First Amendment right to receive information is not and should not be confined to receiving it in the home. The information received in *Society of Sisters* was in the schools, and the information received in *Griswold* was at a birth control center. Nothing in *Lamont* suggests that mail is protected only when addressed to one's dwelling place.

The First Amendment right of privacy is not restricted to the home. The dissent of Justice Brandeis in *Olmstead*, referred to in *Stanley*, regarded that right as embracing privacy "in the home, in an office, or elsewhere . . ." (277 U.S. at 477). The privacy referred to in *NAACP v. Alabama* was one of personal association clearly unlimited to the confines of the dwelling place. It would be strange if an individual could be punished for possessing material for private use discovered in the pocket of his overcoat, or in his briefcase as he took one step beyond the threshold of his home, or if the material were discovered in his office cabinet, or in the trunk of his automobile.

Moreover, under the Fourth Amendment, privacy in the home is neither more nor less protected than privacy out-

side the home. As this Court said in *Hoffa v. United States*, 385 U.S. 293, 301:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he put something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. (Footnote omitted).

Similarly, in *Katz v. United States*, 389 U.S. 347, 351-52, the Court said:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

The dwelling place therefore is no search-proof haven for illegally possessed articles. Warrants issued on probable cause, defining with particularity the subject matter of the search, may be executed in the home, for example, for narcotics, *Jones v. United States*, 362 U.S. 257, for stolen articles, *Rugendorf v. United States*, 376 U.S. 528, and for illegal whiskey distilleries, *United States v. Ventresca*, 380 U.S. 102. There is no reason to suppose that pursuant to proper warrant, law officers could not inspect books in a home to determine whether wagering transactions were recorded in the margins of say, Edgar Allen Poe's *The Purloined Letter*. Thus, the right of privacy in the home implies no preferred position for the home over any other private place, insofar as the scope of searches is concerned.

Nothing in *Roth v. United States*, 354 U.S. 476, or in *United States v. Reidel*, 402 U.S. 351, is inconsistent with the rights of privacy described in *Stanley*. *Roth*, decided before *Stanley*, upheld a conviction for use of the mails to distribute

obscene materials commercially. *Reidel* also upheld the constitutionality of a federal statute prohibiting knowing use of the mails for the delivery of obscene matter for commercial purposes. *Reidel* and *Roth* dealt with public distribution of obscene material. The case at bar does not. *Reidel* and *Roth* did not deal with one's constitutional right to decide what he intends to read or to view privately. The case at bar deals with nothing else.

Stanley holds: "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." (394 U.S. at 566). It makes clear that a person's constitutional freedom of speech and press " 'necessarily protects the right to receive.' " (394 U.S. at 564).

That is far different from Reidel's assertion of a right to sell obscene material and to distribute it. As this Court said in *Reidel:* "The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution." (402 U.S. at 356).

The exercise of a man's constitutional right to read or to observe, in private, whatever he wishes, makes the subject matter of what he reads or observes irrelevant. To hold otherwise would be to endorse governmental thought control. It is only when the individual determines to forego his constitutional privacy, and to disseminate his material—whatever it may be—in public, by sale or otherwise, may the state begin to have a basis for a constitutional interest in the subject matter of that material.

On the same day that this Court decided *Reidel*, it also decided *United States v. Thirty Seven (37) Photographs.* In *Thirty Seven (37) Photographs*, claimant Luros, who returned from abroad with 37 photographs which were seized by cus-

toms, stipulated that he intended to use some or all of the photographs in a book to be printed for commercial distribution. The District Court had held the statute, 19 U.S.C. 1305(a), unconstitutional on procedural grounds as well as on substantive grounds. The plurality opinion of this Court said that the District Court's decision on substantive grounds may have been reached either, (a) because it believed Luros had a right to import the photographs for "planned distribution to the general public," or (b) because it believed, under *Stanley* that a person would have a right "to import them for his own private use and that § 1305(a) was therefore void as overbroad because it prohibits both sorts of importation. If this was the [District] court's reasoning, the proper approach, however, was not to invalidate the section in its entirety, but to construe it narrowly and hold it valid in its application to Luros." (402 U.S. at 375 n. 3).

The statute was construed by this Court to apply constitutionally to *Thirty-Seven (37) Photographs*, which was, by stipulation, a case of importation for commercial purposes. It was not a case involving importation for private use.

Nevertheless, the plurality opinion said (402 U.S. at 376): "Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution."

Justice Stewart, concurring, stated: "I would not . . . decide, even by way of dicta, that the Government may lawfully seize literary material intended for the purely private use of the importer." (402 U.S. at 379). Justice Harlan, concurring, said that he "would hold that Luros lacked standing to raise the overbreadth claim." (402 U.S. at 378).

The case at bar, unlike *Thirty Seven (37) Photographs*, squarely presents the question of importation for private use. Fundamentally, it is the intent with which a person imports a book or film which must be controlling. It may well be that a person's constitutional right to think, or to read or to see, must give way to the constitutional authority of the state to prohibit or control, if he in truth does not seek to exercise private rights, but, to the contrary, intends to sell material or to distribute it in public. But so long as what material he has, he intends to keep to himself in a personal or private way, he should be protected against the state, either because of *Stanley* or because of what *Stanley* foreshadows. And the fact that what he possesses (ever intending to keep it private) may rest in his luggage on his return from abroad affords no basis to deny him his constitutional right of privacy.

II

The Right of Private Possession Is Not Inconsistent with the Government's Right of Customs Inspection

The validity of customs inspection is not in question here. The most thorough searches can be viewed as necessary to ascertain what articles are being imported, whether and to what extent they are dutiable, and whether they may lawfully be imported.

Nor is it questioned that customs officials may require a declaration from the importer as to the intended use of the imported material. For example, household effects of persons returning from living abroad are duty-free, so long as the effects were actually used abroad by the importer or his family, for not less than one year, and the effects are not intended for any other person, or for sale (19 U.S.C. 1202, Item 810.10). The customs collector relies on "a declaration of the owner on customs Form 3297" as to the availability of duty-free treatment for household effects.

(19 C.F.R. 10.11). Customs regulations (19 C.F.R. 10.12) provide that "the required use of the effects abroad for 1 year must be proven to the satisfaction of the Collector who may, in his discretion, require evidence other than the declaration of the applicant."

Additionally, for persons entering the United States after residence abroad, duty-free treatment is afforded their personal possessions other than household effects. This treatment also depends on the person's intent. (19 U.S.C. 1202, Items 810.10-828.00).

And, in accordance with *United States v. Thirty-Seven (37) Photographs*, since obscene materials intended for commercial use may be excluded, inquiry can be made as to the intention of an importer of allegedly obscene material.

Likewise, intent of the importer is a relevant factor under the *proviso* of 19 U.S.C. 1305(a), the very statute before the Court in this case. By that *proviso*, the Secretary of the Treasury may admit "the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes." See *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934).

Thus, the fact that customs officers may not detain obscene material intended for private use in no way impedes the making of searches, the imposition of duties, and the seizure of obscenity intended for commerical use.

III

If 19 U.S.C. 1305(a) Were Applied to Importation of Obscene Material Intended for Private Use, There Would Be a Chilling Effect on the Right to Import Non-Obscene Material

Obscenity is a complex concept. The obscene is "material which deals with sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U.S. at 487. A book as a whole must be judged by that measure (*Id.* at 489-490), and the prurient interest appealed to must be that of normal adult persons, not the young or the immature, or the highly prudish (*Id.* at 490). In any event, if a work reflects "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (*Id.* at 484), the work has constitutional protection.

Under this definition, "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of representation of sexual matters; and (c) the material is utterly without redeeming social value." *A Book v. Attorney General*, 383 U.S. 413, 418.

As this Court observed in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." As stated in *Speiser v. Randall*, 357 U.S. 513, 525, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn."

A traveler who desires to comply with the law relating to obscene materials will hardly be able to make comfortable judgments as to the location of that "dim and uncertain line" before purchasing books or films abroad which he

intends to bring home for private use. Moreover, he will hardly be comforted by the thought that he may be able to keep his purchased property only after litigating the matter in the Federal Courts.

The returning traveler who is not a commercial importer and who does not desire to import obscene materials as he is making his purchases abroad, has a right to be free from such risks under the First Amendment.

The difficulties attending an individual who desires to import books or films for private use increase in the case of mail orders from catalogues and advertisements. Such a person would at best have difficulty in anticipating on which side of the "dim and uncertain line" the material he wishes to order might fall. If the title or description of the work suggests that it might possibly have an appeal to a prurient interest, that fact alone could deter him from ordering the work, out of apprehension of possible seizure and ensuing litigation.

The application of 19 U.S.C. 1305(a) to imported material intended for private use would therefore have a severely chilling effect on the individual's right to import non-obscene materials—an effect which cannot be squared with the principle enunciated by this Court in *Freedman v. Maryland*, 380 U.S. 51, *Teitel Film Corp. v. Cusack*, 390 U.S. 139 and *Blount v. Rizzi*, 400 U.S. 410. As the Court held in *Freedman*, and reiterated in *Teitel* and *Blount*, to avoid the constitutional infirmity of prior restraint on non-obscene material, a scheme of censorship must place the burden of instituting judicial proceedings, and of proving that the material is unprotected expression, on the censor, and must require prompt judicial review.

That principle would be reduced to insignificance if residents of the United States are put in fear of seizure of constitutionally protected works by the expectation that their private books and films may be seized and judicially proceeded against, at points of entry.

It would be no answer that only small amounts of material would be seized because an individual would be unlikely to bring home more than a few books or films for his private use. Indeed, the prior restraint is the more aggravated by that fact, because of the disproportionate expense of conducting litigation involving the seizure of an occasional book or film. In addition, there would be reluctance on the part of the individual to suffer the attendant publicity of defending against a charge by his government that he had imported obscene material. The prior restraint would therefore be all the more pervasive and insidious because it would fall with special harshness on a large number of ordinary individuals.

IV

Prohibition of Importation for Private Use Cannot Be Justified as an Incident to Enforcement of Other Anti-Obscenity Law

Appellant argues that if importation for private use is constitutionally protected, the enforcement of valid anti-obscenity laws would be "seriously undercut." *Stanley* provides the complete rebuttal:

> Finally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. (394 U.S. at 567-68).

Aside from the fact that prosecutorial convenience is no warrant for diluting liberties protected by the Constitution, Appellant's argument lacks factual support. There is only speculation that a right to private importation might lead to abuse so substantial as to undercut enforcement of valid laws. Indeed, the importation of a large quantity of material, by itself, can give rise to an inference that its intended use is not private, but is commercial, notwithstanding the importer's declaration.

> When that case arises in which the Government determines that it should go to trial upon the facts, a showing that multiple copies of a particular piece of matter are sought to be imported by the same person should raise an extremely strong inference against any claim that the material is sought for allegedly scientific purposes. (*United States v. 31 Photographs*, 156 F. Supp. 350, 360 (S.D.N.Y. 1957)).

Enforcement of anti-obscenity laws provides neither constitutional or practical justification for the abridgement of one's constitutional right to import material for private use.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

THOMAS H. KUCHEL
WYMAN, BAUTZER, ROTHMAN & KUCHEL
1211 Connecticut Avenue, N.W.
Washington, D.C. 20036

Amicus Curiae

Of Counsel:

EDWARD WEINBERG
GEORGE MIRON
EZRA C. LEVINE
1211 Conn. Ave., N.W.
Washington, D.C. 20036

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